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In the

Supreme Court of the United States

October Term, 1971

Nos. ....., ..., ...

JOAN S. MAHAN, Secretary,
State Board of Elections, et al., *Appellants,*

v.

HENRY E. HOWELL, JR., et al., *Appellees.*

EDGAR A. PRICHARD, Member,
State Board of Elections, et al., *Appellants,*

v.

CLIVE L. DUVAL, 2d, et al., *Appellees.*

EDGAR A. PRICHARD, Member,
State Board of Elections, et al., *Appellants,*

v.

STANFORD E. PARRIS, et al., *Appellees.*

JURISDICTIONAL STATEMENT ON BEHALF OF APPELLANTS

PRELIMINARY STATEMENT

Appellants Joan S. Mahan, Secretary, U. P. Joyner, Jr., Chairman, and Edgar A. Prichard, Member, together constituting the Virginia State Board of Elections, appeal from that portion of the Interlocutory Order of the three-judge

District Court[1] below declaring Virginia's Reapportionment Acts, Chap. 116 of the 1971 Acts of Assembly (House Legislative Districts) and Chap. 120 of the 1971 Acts of Assembly as amended by Chap. 246 (Senate Legislative Districts) violative of the Fourteenth Amendment of the United States Constitution. This appeal is taken insofar as the Court's Order relates to the fragmenting of political jurisdictions in the House plan and the consolidation of single member districts into a multimember district in the Senate plan.

I.

OPINION OF THE COURT BELOW

The opinion of the three-judge District Court for the Eastern District of Virginia in the instant case is as yet unreported and will be found as *Henry E. Howell, Jr., et al.* v. *Joan S. Mahan, Secretary, State Board of Elections, et al.*,

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[1] Civil Action No. 105-71-N, *Howell* v. *Mahan,* was filed on March 3, 1971, application for injunction being made to the District Judge of the Norfolk Division of the United States District Court for the Eastern District of Virginia. Civil Action No. 174-71-R, *DuVal* v. *Prichard,* was filed shortly thereafter on March 8, 1971, application for injunction being made to the District Judge of the Richmond Division. Though not consolidated, the same three-judge court was appointed pursuant to 28 U.S.C. § 2284 to hear the matters; the Court was composed of a judge of the United States Court of Appeals for the Fourth Circuit and the two District Judges to whom application for injunction was made in each case respectively. Subsequently, Civil Action No. 111-71-A, *Parris* v. *Prichard,* was filed on March 22, 1971, application for injunction being made to the District Judge of the Alexandria Division. A separate three-judge court was appointed to hear this matter, composed of the District Judge to whom application for injunction was made as well as the Circuit Judge and a District Judge previously appointed to the other cases.

By order of the Court entered on April 7, 1971, the cases were consolidated "for trial and hearing before the respective three-judge courts" theretofore designated, and the hearing proceeded before a "four-judge" court.

Civil Action No. 105-71-N, as consolidated with *Stanford E. Parris, et al.* v. *Edgar A. Prichard, Member, State Board of Elections, et al.*, Civil Action No. 111-71-A, and *Clive L. DuVal, 2d, et al.*, v. *Edgar A. Prichard, Member, State Board of Elections, et al.*, Civil Action No. 174-71-R, in Appendix pp. 1-22. This single Jurisdictional Statement is filed as allowed by Rule 15 (3) of the Rules of the Supreme Court of the United States, the several cases involving identical or closely related questions.

II.

THE JURISDICTION OF THE COURT

1.

The suits herein were instituted by appellees, Clive L. DuVal, II, et al., and Stanford E. Parris, et al., both seeking to enjoin the redistricting plan promulgated by the General Assembly of Virginia for the House of Delegates, and by appellee Henry E. Howell, Jr., et al., seeking to enjoin the redistricting plan promulgated for the Senate as it pertained to the City of Norfolk, Virginia.

Appellees in the House suits sought declaratory judgment and injunctive relief restraining the enforcement, operation and execution by appellants of Chapter 116 of the 1971 Acts of Assembly [§ 24.1-12.1 of the Code of Virinia (1950), as amended]. Appellee DuVal alleged that the House Districts as created constituted constitutionally impermissible variations of population; constituted invidious discrimination against Northern Virginia as a whole by the failure to allocate an additional delegate to the area; and constituted invidious discrimination by the creation of multimember districts. Appellee Parris raised the same allegations except instead of attacking multimember districts, alleged invidious

discrimination by the division of Fairfax County (allocated ten delegates) into two five-member multimember districts, discussed infra. Jurisdiction was invoked under 42 U.S.C. §§ 1983 and 1988; 28 U.S.C. § 1343 (3) and the Fourteenth Amendment to the Constitution of the United States. A declaratory judgment was sought pursuant to 28 U.S.C. §§ 2201 and 2202 and three-judge District Courts were convened pursuant to 28 U.S.C. §§ 2281 and 2284.

Appellee in the Senate suit sought a declaratory judgment and preliminary and permanent injunctive relief restraining the enforcement, operation and execution by appellants of Chapter 120 of the 1971 Acts of Assembly as amended by Chapter 246 [§ 24.1-14.1 of the Code of Virginia (1950), as amended], as such Act pertained to the City of Norfolk, Virginia. Appellee Howell alleged that the dividing of the City of Norfolk, together with a portion of the City of Virginia Beach, into three single member Senatorial Districts constituted invidious discrimination and prayed for the creation of a multimember district. Jurisdiction was invoked under 42 U.S.C. §§ 1983 and 1988; 28 U.S.C. § 1343 (3), and the Fourteenth and Fifteenth Amendments to the Constitution of the United States; jurisdiction being invoked as to the latter by Amended Complaint under 42 U.S.C. §§ 1973 and 1973 (c). A three-judge District Court was convened pursuant to 28 U.S.C. §§ 2281 and 2284.

This appeal is taken from that part of the interlocutory order of the three-judge District Court (1) declaring the redistricting of the legislative seats of the Virginia House of Delegates violative of the Equal Protection Clause of the Constitution of the United States, insofar as such Order mandates the fragmentation of political jurisdictions within the Commonwealth; (2) declaring the redistricting of the legislative seats of the Virginia Senate violative of the Equal

Protection Clause of the Constitution of the United States, insofar as said Order mandates the consolidation of single member districts creating a three-member multimember district; and (3) enjoins appellants and their successors in office as well as the agents, employees and attorneys thereof, from conducting any elections in any electoral districts except those established and specified by the Court.

. The statute pursuant to which this appeal is brought is 28 U.S.C. § 1253.

2.

The judgment of the three-judge District Court in question is set forth in Appendix pp. 23-25. The date and time of the entry of the judgment sought to be reviewed, is 1 P.M., Eastern Daylight Time, July 2, 1971. The notice of appeal was filed in the United States District Court for the Eastern District of Virginia, Norfolk Division on July 13, 1971, and is set forth in Appendix pp. 49-50.

3.

The United States Code, 28 U.S.C. § 1253, confers jurisdiction of this appeal upon this Court. Such statute provides:

> "Except as otherwise provided by law, any party may appeal to the Supreme Court from an order granting or denying, after notice and hearing, an interlocutory or permanent injunction in any civil action, suit or proceeding required by any Act of Congress to be heard and determined by a District Court of three judges."

4.

The following cases sustain the jurisdiction of this Court:

(a) *Davis* v. *Mann,* 377 U.S. 678, 12 L.ed. 2d 609, 84 S.Ct. 1453 (1964);

(b) *St. John* v. *Wisconsin Employment Relations Board*, 340 U.S. 411, 414, 95 L.ed. 386, 71 S.Ct. 375 (1951);

(c) *Reynolds* v. *Sims*, 377 U.S. 533, 84 S.Ct. 1362, 12 L.ed. 2d 506 (1964);

(d) *Baker* v. *Carr*, 369 U.S. 186, 82 S.Ct. 691, 7 L.ed. 2d 663 (1962).

5.

This appeal involves the validity of the Virginia Legislative Reapportionment Act for both Houses of the Virginia General Assembly—the Senate and House of Delegates, adopted in 1971 as required by Article II, § 6, of the Virginia Constitution. The text of such Acts are set out verbatim in Appendix pp. 31-43 and due to the length only the citations are set forth herein, as follows:

(a) Chapter 116 of the 1971 Acts of Assembly, p. 198, codified as § 24.1-12.1, Code of Virginia (1950), as amended, Vol. 5, 1971 Cumulative Supplement, p. 74 (Legislative Districts of the House of Delegates).

(b) Chapter 120 of the 1971 Acts of Assembly, p. 219, as amended by Chapter 246, p. 499, codified as § 24.1-14.1, Code of Virginia (1950), as amended, Vol. 5, 1971 Cumulative Supplement, p. 75 (Legislative Districts of the Senate). (Chapter 246 amending Chapter 120 not as yet codified.)

III.

THE QUESTIONS PRESENTED

Did the Court below err in declaring Virginia's Legislative Reapportionment Acts of 1971, Chapter 116 and Chap-

ter 120 as amended by Chapter 246 (Acts of Assembly 1971) violative of the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution insofar as the Court (1) ordered in the Legislative Districts for the House of Delegates fragmentation of political jurisdictions despite the fact that the evidence demonstrated that the districts were as close to mathematical exactness as possible, keeping intact political jurisdictions; (2) ordering as to the Legislative Districts in the Senate, the creation of a three-man multimember district despite the fact that the General Assembly as to that body desired complete single member districts; and (3) enjoined appellants from conducting any elections except in those electoral districts created, established and specified by the Court, despite the fact that the Virginia General Assembly made known its intent to enact any new reapportionment legislation required by any Constitutional requirement decreed by the Court.

IV.

STATEMENT OF THE CASE

This appeal is taken from an Interlocutory Order of the United States District Court for the Eastern District of Virginia entered in the instant cases on July 2, 1971. The appellants, defendants below, are the Secretary of the Virginia State Board of Elections and the members thereof. The appellees, plaintiffs below, are registered and qualified voters of the Commonwealth of Virginia, as are the plaintiff-intervenors. Defendant-intervenors include the cities of Norfolk and Virginia Beach as well as other registered and qualified voters of the Commonwealth. The cases were consolidated for hearing before the four judges who constituted the three three-judge panels. (See fn. 1, *supra.*)

The three separate suits were filed by plaintiffs in the District Court seeking to enjoin the Virginia State Board of Elections from conducting the upcoming elections for membership in the General Assembly of Virginia in the legislative districts created by the General Assembly at its 1971 Extra Session; which session and which action of reapportioning was mandated by the Virginia Constitution of 1971, Article II, Section 6 and the "Schedule" Section 5.[2] The Commonwealth of Virginia has traditionally elected her representatives to the State General Assembly in the odd years; terms for members of the House of Delegates being two years and for the Senate, four years. The entire membership of both Houses of the General Assembly will be elected this

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[2] Revised Constitution of Virginia, Article 2, Section 6. "Members of the House of Representatives of the United States and members of the Senate and of the House of Delegates of the General Assembly shall be elected from electoral districts established by the General Assembly. Every electoral district shall be composed of contiguous and compact territory and shall be so constituted as to give, as nearly as is practicable, representation in proportion to the population of the district. The General Assembly shall reapportion the Commonwealth into electoral districts in accordance with this section in the year 1971 and every ten years thereafter.

"Any such reapportionment law shall take effect immediately and not be subject to the limitations contained in Article IV, Section 13, of this Constitution."

Schedule, Section 5. "The General Assembly shall convene at the Capitol at noon on the first Wednesday in January, nineteen hundred seventy-one. It shall enact such laws as may be deemed proper, including those necessary to implement this revised Constitution. The General Assembly shall reapportion the Commonwealth into electoral districts in accordance with Article II, Section 6, of this Constitution. The General Assembly shall be vested with all the powers, charged with all the duties, and subject to all the limitations prescribed by this Constitution except that this session shall continue as long as may be necessary; that the salary and allowances of members shall not be limited by Section 46 of the Constitution of 1902 as amended and that the effective date limitation of Section 53 of the Constitution of 1902 as amended shall not be operative."

year in November of 1971, and thus affected by the redistricting.[3]

Pursuant to the requirements of reapportionment, the General Assembly, by Acts approved March 1, 1971,[4] divided the one hundred member House of Delegates into fifty-two districts. The redistricting was a traditional combination of single and multimember districts as well as floater districts. See *Davis* v. *Mann*, 377 U.S. 678, 12 L.ed.2d 609, 84 S.Ct. 1453 (1964). In no case did the plan for the House of Delegates abandon the political jurisdictional lines of the counties and cities and an attempt was made to insure that such lines were maintained and not fragmentized. Although the ten delegates allotted to the County of Fairfax were divided into two five-member multimember districts, the division was made along the congressional redistricting lines previously agreed to, and Fairfax County was not, though divided, fragmentized, i.e., a *portion* of such jurisdiction being placed with any other political jurisdiction.

The deviations from absolute equality of population arrived at by the redistricting of the House ranged from an under-representation of plus 9.6% to an over-representation of minus 6.8%, or a total variance of 16.4%. As noted by the Court, however, the 42nd District, a floater shared by the cities of Chesapeake, Portsmouth and Virginia Beach

[3] "§ 24.1-11. The members of the House of Delegates shall be elected on the Tuesday succeeding the first Monday in November, nineteen hundred seventy-one, and every two years thereafter for a term of two years to begin on the second Wednesday in January succeeding their election."

"§ 24.1-13. Members of the Senate of Virginia to represent each senatorial district of the Commonwealth shall be elected on the Tuesday after the first Monday in November, nineteen hundred seventy-one, and every four years thereafter, for a term of four years, to begin on the second Wednesday in January succeeding their election."

[4] Acts of Assembly, 1971, cc. 116, 120.

would have increased the total variance to as much as 23.6%, depending upon how such floater would be calculated.

In the forty member State Senate, the General Assembly created forty single-member districts. The application of this single-member district policy for the upper house did create some fragmentizing of political jurisdictions in twelve instances out of the one hundred thirty-eight political jurisdictions (counties and cities) in the Commonwealth. The division of the City of Norfolk into three single-member Senatorial Districts, one of which included a portion of the City of Norfolk and a contiguous portion of the City of Virginia Beach, were the districts under attack in the senatorial suit. The three districts, known as the Fifth, Sixth and Seventh Senatorial Districts, had populations of 116,084, 116,103, and 115,959, respectively. Since each, ideally, would have 116,212, the percent deviations from the norm for the three districts were minus 0.1%, minus 0.02%, and minus 0.2%, respectively.

The redistricting of the Senate was done entirely on the basis of the numbers provided by the 1970 Decennial Census. The population of the Norfolk Naval Base, consisting of 36,693 as enumerated by the Bureau of Census at the United States Naval Station, was allocated to the Fifth Senatorial District, where said Station was geographically situated. The evidence introduced showed that approximately 21,000 of these individuals enumerated in the Fifth District did not, in fact, "reside" there, in the legal context of the word, and further that some 9,000 of those 21,000 did not even reside in the Sixth or Seventh Districts as well. It was alleged that the only manner of correcting this alleged inequity would be to create a three-member multimember Senatorial District so that these Naval personnel home-ported at Norfolk could be spread throughout the entire city.

The cases were originally set for consolidated trial in the District Court on May 24, 1971. On May 7, 1971, however, the Attorney General of the United States, acting pursuant to § 5 of the Voting Rights Act of 1965, 42 U.S.C. § 1973(c), interposed objections to Virginia's reapportionment plans as related to both the House of Delegates and the Senate. (See Appendix p. 51.) Objections to the House plan were based on five multimember districts in certain metropolitan areas, and objection to the Senate plan was confined to the route of the dividing line between the Fifth and Sixth Senatorial Districts in the City of Norfolk. As a result of these objections, however, the District Court on May 24 directed that the instant cases be continued until June 15, 1971, and further directed the General Assembly, which had remained in session since January of 1971, to act to remove the objections of the Attorney General, stating:

> "(c) That unless on or before June 15, 1971, Virginia has adopted and submitted reapportionment legislation either to the Attorney General of the United States or to the District Court for the District of Columbia for declaratory judgment as provided for in Section 5 of the Voting Rights Act, this Court shall proceed with the trial of these suits and thereafter formulate a plan of reapportionment within the prescription of the Voting Rights Act and resolving the valid objections, if any, of the plaintiffs to the 1971 reapportionment legislation; . . .". (See Appendix pp. 43-46.)

Following this action, this Court on June 7, 1971, handed down its decision in the case of *Whitcomb* v. *Chavis,* 403 U.S. 124, 29 L. ed. 2d 563, 91 S. Ct. 1858 (1971), thus causing removal by the Attorney General of the objections to the House plan. (Appendix p. 53.) The General Assembly then enacted an amendment to the Senate Plan for redraw-

ing the line between the Fifth and Sixth Senatorial Districts to remove the remaining objection,[5] and the instant cases then proceeded to trial on June 16, 1971.

The District Court in its Interlocutory Order declared and adjudged Chapters 116 and 120 (as amended by Chapter 246) of the Acts of Assembly of 1971, generally known as the reapportionment statutes, to be invalid as violative of the Equal Protection Clause of the Constitution of the United States. The District Court went on to devise its own reapportionment plan for the Virginia House of Delegates, as found in its opinion, and the Court further directed that Senatorial Districts Five, Six, and Seven, comprised of the City of Norfolk and a portion of the City of Virginia Beach, be consolidated into a single district from which three state senators are to be elected at large. It was directed that all elections in Virginia, including those scheduled for November 2, 1971, be held pursuant to the Court's plan, the Order stating:

> "2. That members of the Senate and of the House of Delegates of the General Assembly of Virginia be elected from the electoral districts described in said opinion, anything in the existing statutes of the Commonwealth of Virginia to the contrary notwithstanding;
>
> "3. That such of the defendants herein, and their successors in office, as are charged by law with the conduct of said elections, as well as the agents, employees and attorneys thereof, be, and each of them is hereby, enjoined and restrained from conducting any of said elections in any electoral districts except those established and specified in said opinion as aforesaid; . . .".

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[5] Acts of Assembly, 1971, c. 246. (See also Appendix p. 51, letter of David L. Norman, Acting Assistant Attorney General, Civil Rights Division, dated August 13, 1971, approving Chapter 246 [S.B. 125]).

Notice of Appeal was filed by appellants on July 13, 1971. On July 13 and 14, 1971, motions for a stay pending appeal were tendered to a single judge of each of the three-judge panels, the other two judges of each panel being out of the United States on vacation and hence unavailable. Said motions were denied in each instance. On July 19, 1971, application for a stay pending appeal was made to this Court, which application was denied (per Black, J.) on July 27, 1971.

V.

THE QUESTION PRESENTED IS SUBSTANTIAL

For a number of reasons, the action of the Court below, and the question decided is of such a substantial nature as to require plenary consideration by this Court with briefs on the merits and oral argument.

Initially, in this connection, the action of the Court, regardless of the merit in its ruling on the substantive questions presented, was directly contra and violative of past rulings of this Court regarding the well established doctrines of equity and comity, particularly in the area of state legislative reapportionment.

As indicated in the Statement of the Case, the General Assembly as required convened in Extra Session in January of 1971 and adopted a plan of redistricting for its State Senate and House of Delegates which would be applicable to the 1971 general elections; thus insuring equal representative participation in the making of the laws at the earliest moment in the decade of the Seventies.

The Assembly then *recessed* in lieu of adjournment while the plans were presented to the Attorney General pursuant to the Voting Rights Act of 1965, *Perkins* v. *Mathews*, 400 U.S. 379, 27 L. ed. 2d 476, 91 S.Ct. 431, (1971), and while

awaiting the ruling on constitutional issues raised by plaintiffs in the instant suits.

The Attorney General interposed his objections to the plan, and as a result the Court postponed on its own motion, any rulings; the Attorney General then withdrew his objections in light of *Chavis* and the Court on June 16, 1971, heard the constitutional issues raised; its Order of May 24, 1971, being complied with when all objections raised by the Attorney General had been appropriately withdrawn and the Senate plan amended.

Then on July 2, 1971, the lower Court entered its Order, making it perfectly clear that the General Assembly need not have waited patiently in recess to correct any constitutional error decreed by the Court, for the Court drew its own districts and mandated, as indicated in the Statement of the Case, that all elections for the General Assembly must be held from the districts described in the opinion. These matters of "legislative consideration and determination", *Reynolds* v. *Sims,* 377 U.S. 533, 586, 84 S.Ct. 1362, 12 L.ed.2d. 506 (1964), having been judicially decreed, the General Assembly adjourned on July 19, 1971, with the mandate that an appeal be made to this Court requesting correction of the flagrant abuses of judicial discretion constituted by the District Court's action. As this Court has consistently, since the era of *Baker* v. *Carr,* 369 U.S. 186, 82 S.Ct. 691, 7 L.ed.2d 663 (1962), made it known that, though judicial *determination* of constitutional limitations in redistricting is proper, judicial *relief* should be restrained.

As stated in *Burns* v. *Richardson,* 384 U. S. 73, 84-85, 16 L.ed.2d 376, 86 S.Ct. 1286 (1966):

> "Our decision in *Reynolds* v. *Sims* emphasized that 'legislative reapportionment is primarily a matter for legislative consideration and determination, and that

judicial relief becomes appropriate only when a legislature fails to reapportion according to federal constitutional requisites in a timely fashion *after having had an adequate opportunity to do so.*' 377 U.S., at 586, 12 L. ed. 2d at 541. Until this point is reached, a State's freedom of choice to devise substitutes for an apportionment plan found unconstitutional, either as a whole or in part, should not be restricted beyond a clear command of the Equal Protection Clause." (Emphasis added.)

In the *Burns* case the lower Court concluded that as a matter of State law, House and Senate apportionment was severable. It sustained the constitutionality of the House plan and ordered that a new Senate plan only be submitted by the legislature to the Court. It was in this context that this Court emphasized that even though the legislature itself was proposing the new Senate plan that the Court should not have limited the legislature to a consideration of apportionment of only one body of the bicameral assembly. A legislature must be free to construct a *total scheme of apportionment best suited in its opinion* to the State's needs.

In the case at bar, the lower court exceeded even the limited restraints placed upon the State of Hawaii in the *Burns* case and mandated that the General Assembly should redistrict no further and that all elections for members of the General Assembly would be held only under those districts devised by the Court.

The action of the lower Court in postponing June primaries for not only members of the General Assembly but local officers not even involved in redistricting, and then stating without any guidelines that Virginia's redistricting plan was invalid, is in direct conflict with the actions of the Alabama Court commended by this Court in *Reynolds* v. *Sims, supra,* wherein it was stated:

> "We feel that the District Court in this case acted in a most proper and commendable manner. It initially acted wisely in declining to stay the impending primary election in Alabama, and properly refrained from acting further until the Alabama Legislature *had been given an opportunity to remedy the admitted discrepancies* in the State's legislative apportionment scheme, *while initially stating some of its views to provide guidelines for legislative action.*"

The District Court in Virginia's case abandoned its role of rendering judicial determinations, and, without consideration of the propriety of such action, invaded the legislative field, allowed the legislature no opportunity to react to its judicial determination, and ordered into effect its own reapportionment plan. Indeed, though the Alabama District Court in *Reynolds* v. *Sims* ordered into effect a redistricting plan of its own, it did so only as this Court in praise stated:

> "Additionally, the Court below acted with proper judicial restraint, *after the Alabama Legislature had failed to act effectively* in remedying the constitutional deficiencies in the State's legislative apportionment scheme, . . . in prescribing a plan admittedly provisional in purpose so as not to usurp *the primary responsibility for reapportionment which rests with the legislature.*" (Emphasis added.)

Even in the previous Virginia reapportionment case of the Sixties, *Davis* v. *Mann,* 377 U.S. 678, 12 L.ed.2d 609, 84 S.Ct. 1453 (1964), this Court made clear that legislative reapportionment must be done by the General Assembly, stating:

> "*After* the District Court has provided the Virginia legislature with an *adequate opportunity* to enact a valid plan, it can then proceed, should it become necessary,

> to grant relief under equitable principles to insure that no further elections are held under an unconstitutional scheme. . . . The court below [could] take further action should the Virginia legislature fail to act promptly in remedying the constitutional defects in the State's legislative apportionment plan."

The latest ruling of this Court in the reapportionment field in the case of *Ely* v. *Klahr*, — U.S. — (June 7, 1971), commended and upheld the action of the District Court for the State of Arizona in refraining from interfering with the Arizona legislative plan even though the feared result was that an election would be held under a plan found unconstitutional by the Court. This Court noted and reconfirmed its earlier ruling in *Reynolds* v. *Sims* that:

> "Districting and apportionment are legislative tasks in the first instance, and the Court did not err *in giving the legislature a reasonable time to act* based on the 1970 census figures which the Court felt would be available in the summer of 1971."

Intervention by the federal courts in the form of granting equitable *relief* in cases involving apportionment statutes is analogous with the exercise of federal equity jurisdiction in cases involving the enforcement of state criminal laws and the same result, namely, abstention, should be reached in both instances. We do not contend here that the court below should have abstained on the basis that a state court must first decide questions of state law. Federal jurisdiction, as this Court stated in *Davis* v. *Mann,* is properly invoked and where relevant State constitutional and statutory provisions are plain and unambiguous there is no necessity for federal courts to abstain pending determinations of questions of state law in a state court. However, ambiguity and need for interpretation in a state statute do not constitute the only basis

for resorting to absention. There are numerous cases where abstention has been sanctioned and aproved on grounds of *comity* with the states in order to avoid a result in "needless friction with state policies." *Railroad Commission of Texas* v. *Pullman Co.*, 312 U.S. 496, 61 S.Ct. 643, 85 L.ed. 971 (1941). This Court itself has sustained and affirmed abstention on the grounds of comity, stating, for example, in *County of Alleghany* v. *Mashuda Co.*, 360 U.S. 185, 3 L. ed. 2d 1163 (1959):

> "This Court has also upheld an abstention on grounds of comity with the states when the exercise of jurisdiction by the federal court would disrupt a state administrative process, *Burford* v. *Sun Oil Co.*, 319 U.S. 315; *Pennsylvania* v. *Williams*, 294 U.S. 176, interfere with the collection of state taxes, *Toomer* v. *Witsel*, 334 U.S. 385, 392; *Great Lakes Dredge & Dock Co.* v. *Huffman*, 319 U.S. 293, or otherwise create a needless friction by unnecessarily enjoining state officials from executing domestic policies, *Alabama Public Service Commission* v. *Southern R. Co.*, 341 U.S. 341; *Hocks* v. *Hamel*, 288 U.S. 52."

As indicated, we do not ask or contend that the lower Court should abstain from ruling on the *substantive* issues involved. We do contend that the District Court should and must be directed, after judicially determining the substantive issues, to abstain from judicially imposing the type of final relief that it did. The action of the Court in implementing its own plan of redistricting, without giving the General Assembly an opportunity to devise its own substitutes, is in and of itself fundamental error which this Court should reverse.

Moreover, the action of the Court was not wrong only in a theoretical sense, but in fact wrought drastic and adverse change to the plan the General Assembly felt "best suited

to the State's needs." Examples of these unwarranted changes will be discussed throughout the brief, but it should suffice to note at this point one significant example.

The General Assembly felt, as do twenty-five of her sister States[6], that the upper body of Virginia's legislature should have exclusively single-member districts, while the lower body should, while maintaining population equality, guarantee an independent voice to political jurisdictions by using a combination of single, multimember and floater districts.

The District Court, striking down the manner in which the Commonwealth utilized the enumeration by the United States Census Bureau of Naval personnel, ordered consolidation in the Tidewater area of the three single member senatorial districts (Fifth, Sixth and Seventh) comprised of the City of Norfolk and a portion of the City of Virginia Beach. The reason the Court ordered elections from the consolidated district rather than readjusting the three single member districts was:

> "The Court has no survey data as to place of actual residence sufficiently precise to permit creation of three single-member districts."

Though, as will be seen *infra*, the Court erred in holding that census figures could not be utilized, it certainly should not have gone beyond its holding by declaring the relief in the form of a multimember district. It should have ruled and then allowed the General Assembly the opportunity to

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[6] California, Colorado, Connecticut, Delaware, Idaho, Illinois, Kentucky, Maine, Massachusetts, Michigan, Minnesota, Missouri, Nebraska, New Hampshire, New Mexico, New York, Ohio, Oklahoma, Pennsylvania, Rhode Island, Tennessee, Texas, Utah and Wisconsin, are other States which have exclusive single-member districts in their State Senate. See, *Book of the States,* Apportionment of Legislatures, p. 82.

see if sufficient data could be found to create single member districts within the requirements of the Court's order and most important, within the framework of single member districts for the Senate, which was felt best suited to the needs of representation in the Commonwealth of Virginia. The balance of representation between the two bodies of the General Assembly was thus abolished by the Court's order without any chance given the General Assembly to restore the same.

Manifestly, the Court below not only has set a precedent by departing from principles of equity well established by this Court, it has in deciding the substantive issues involved failed to properly apply determinations of this Court in the reapportionment field.

As recognized since *Reynolds* v. *Sims,* the development of permissible mathematical deviations must be developed "on a case by case basis," 377 U.S. at 578. The extent to which equality may practically be achieved may differ from State to State and from district to district. *Wesberry* v. *Sanders,* 376 U.S. 1, 84 S.Ct. 526, 11 L.ed.2d 481 (1964). In *Swann* v. *Adams,* 385 U.S. 440, 17 L.ed.2d 501, 87 S.Ct. 569 (1967), this Court emphasized that simply because a certain percentage variation is upheld in one case, this does not mean that it is authority for all cases to follow:

> ". . . the fact that a [certain percentage] variation from the norm is approved in one State has little bearing on the validity of a similar variation in another State. 'What is marginally permissible in one State may be unsatisfactory in another, depending upon the particular circumstances of the case.' " 385 U.S. at 445.

A Court may not therefore either uphold or throw out as unconstitutional mathematical deviations existing in a legislative redistricting plan simply because other cases have, in

considering various mathematical variations, found them constitutional, or even found variations of smaller magnitude to be unconstitutional. The goal to be reached by a legislature is not some preconceived artificial percentage variation. The goal, and the standard which the courts must decide whether the legislature met, is a good faith effort to achieve precise mathematical equality with only the limited population variances which are unavoidable despite this good faith effort or for which justification is shown. *Kirkpatrick* v. *Preisler,* 394 U.S. 526, 22 L.ed.2d 519, 89 S.Ct. 1225 (1969), citing *Reynolds* v. *Sims, supra.*

Yet despite that each and every decision of this Court requires a determination on a case by case basis whether a good faith effort was made to achieve mathematical equality, the Court below ignored the facts in the House plan and struck down the deviations found therein merely because "[p]lans including a variation of approximately that amount have not survived Supreme Court scrutiny [citations omitted]" thus "the statewide range of deviation [calculated with or without the Chesapeake floater] will not pass constitutional muster." *Howell* v. *Mahan,* Appendix p. 3, fn. 1.

This blind adherence to the tyranny of numbers alone was in the face of the only evidence in the case which showed clearly that the deviations in the House plan were "the minimum [possible] above and below the norm, keeping intact political boundaries . . .". (Defendants' Exhibit No. 8.)

The plaintiffs in the House suits put on no evidence showing that smaller deviations in the plan were possible, cf. *Kirkpatrick* v. *Preisler, supra; Swann* v. *Adams, supra.* In fact, they stipulated to Defendants' Exhibit No. 8 and advocated merely a single member districting plan ignoring political boundaries. The Commonwealth would naturally concede that if political boundaries are ignored there is no

reason why a percentage of exactness cannot be achieved. However, it is submitted that tolerance of political jurisdictional lines is justification for some deviation. How much deviation is tolerable has been, as indicated, determined by this Court to be that which is shown unavoidable. The variations in the House plan were shown, by uncontested evidence, unavoidable in the case at bar and the lower Court recognized that dissolving the deviations in the House plan "... *is not achievable at all if the integrity of political subdivisions is mandated.*" App., p. 5.

The policy of the Virginia General Assembly as to the House plan was to keep intact political boundaries. There was no showing that additional or unnecessary population variances among the legislative districts resulted, and therefore there were no variances which the State was mandated to justify. *Kirkpatrick* v. *Preisler, supra*, at 531.

Nor did plaintiffs attempt to show that reliance on political jurisdictional lines was unjustified. Other than an attack on multimember districts *per se*, which attack was rejected by the District Court, the attack on the percentage deviations was solely on the ground that lesser variations had been struck down as unconstitutional. This, as seen, was not a proper method of advocating their alleged unconstitutionality and the Court erred in acceding to this line or argument.

As a matter of law the Commonwealth need not abandon its policy of adherence to political lines, since this Court has recognized such adherence as justifying departure from absolute equality and such recognition is founded as well in previous Virginia cases decided in this Court.

In *Davis* v. *Mann, supra*, at 686-87 the Court recognized that Virginia has a tradition of respecting the integrity of the boundaries of cities and counties in drawing lines and thus districts have always been constructed only of combina-

tions of counties and cities and not by pieces of them, resulting in floterial and multimember districts, both of which have been sustained. As stated in *Reynolds* v. *Sims, supra*:

> "A consideration that appears to be of more substance in justifying some deviations from population-based representation in state legislatures is that of insuring some voice to political subdivisions, as political subdivisions. Several factors make more than insubstantial claims that a State can rationally consider according political subdivisions some independent representation in *at least one body* of the state legislature, as long as the basic standard of equality of population among districts is maintained. Local governmental entities are frequently charged with various responsibilities incident to the operation of state government. In many States much of the legislature's activity involves the enactment of so-called local legislation, directed only to the concerns of particular political subdivisions. And a State may legitimately desire to construct districts along political subdivision lines to deter the possibilities of gerrymandering." (12 L. ed. 2d at 538.) (Emphasis added.)

Swann v. *Adams, supra,* again reaffirmed:

> ". . . that variations from a pure population standard might be justified by such state policy considerations as the integrity of political subdivisions, the maintenance of compactness and contiguity in legislative districts or the recognition of natural or historical boundary lines." (385 U.S. 444.)

Additionally, the argument that the Court's requirements of mathematical exactness in *Kirkpatrick* v. *Preisler* have eliminated maintenance of integrity of political subdivisions as a justification for deviations must be rejected. In *Kirkpatrick* the State's maintenance of political subdivisions was in Congressional redistricting, not State legisla-

tive redistricting, and was for the purpose of inhibiting partisan gerrymandering. It was on this consideration of practical politics that adherence to political boundaries was rejected by the Court. This is a far cry from the desire to insure some voice to political subdivisions as a whole in at least one body of a bicameral State legislature provided basic standards of equality are maintained. The only evidence in the instant case is that such standards were met.

And just recently this Court again reaffirmed that "... a desire to preserve the integrity of political subdivisions may justify an apportionment plan which departs from numerical equality." *Abate* v. *Mundt,* 403 U.S. 182, 29 L.ed.2d 399, 91 S.Ct. 1904 (June 7, 1971). True, the *Abate* decision was based on the peculiar facts existent in Rockland County, New York, and its towns, the local structure of government under scrutiny. However, this Court has long recognized Virginia's tradition of adhering to political jurisdictional lines and affirmed such tradition in *Davis* v. *Mann, supra,* on the same date that it authorized the according of independent representation to political subdivisions, in at least one body of the legislature. *Reynolds* v. *Sims, supra.* Such tradition can be traced at least back to the requirements of the Virginia Constitution of 1850, Article IV, Section 2, which specified apportionment by county and city and also provided for floterial representation as well as rotation in alternating sessions of representatives in the House of Delegates between two counties with population beyond the representative ratio.[7]

As this Court emphasized in *Reynolds* v. *Sims,* local governments carry out much of the various responsibilities of State government as well as having direct concern in the

[7] See McKay, *Reapportionment: The Law and Politics of Equal Representation,* pp. 438-443, for a summary of Virginia reapportionment.

enactment of numerous local legislative enactments. This alone justifies Virginia's tradition of adherence to political jurisdictions. Moreover, the revised Virginia Constitution now allows for the first time special or local legislation for counties as well as for cities. Revised Constitution of Virginia, Article VII, Section 2. Those provisions now permit counties the constitutional flexibility formerly afforded only to cities in providing services for their citizens.

Under the Court's plan, a situation could arise where the 1602 citizens of Wythe County, Virginia, who were placed in the Sixth Legislative District are opposed to local legislation pending in the General Assembly for their county. They must voice such opposition to the delegates representing 91,620 other persons in the Sixth Legislative District composed of the Counties of Carroll, Floyd and Montgomery and the City of Radford, rather than oppose only their 20,537 fellow citizens of Wythe County.

The Commonwealth is not asserting that population equality must take a back seat to the policy of maintaining political subdivision lines. Such goal certainly cannot justify extreme population variances. The basic standards of equality of population among legislative districts must be maintained. It is submitted, however, that the legislature's plan with its 16.4% overall variance, while according independent voice to political jurisdictions in the House of Delegates, is substantially preferable to the District Court's plan with an overall variance of 10.3%[8] which, in its fragmentation effect

[8] The Court indicates in its conclusion that its under-representation is plus 3.8% and its maximum over-representation is only minus 3.4%. However, the Forty-sixth House Legislative District of the Eastern Shore containing the Counties of Accomack and Northampton was allocated one delegate for a population of 43,446 or a deviation of minus 6.5%. These two counties are a part of the Commonwealth of Virginia and cannot be ignored and must be included in the determination of any variance arrived at in an overall plan of redistricting.

in eleven instances throughout the Commonwealth, has decreed "one man—no vote" for many citizens. In most instances these fragmentized segments contain less than three thousand (3,000) persons and as few as one thousand six hundred two (1602) in the case of Wythe County.

While this Court has emphasized in *Burns* v. *Richardson*, *supra*, and *Maryland Committee* v. *Tawes*, 377 U.S. 656, 12 L.ed.2d 595, 84 S.Ct. 1442 (1964), that a court in reviewing an apportionment plan must consider the scheme as a whole, and cannot sever one House from the other, the District Court did the latter.

The reason for viewing the scheme as a whole was succinctly set forth in *Reynolds* v. *Sims*, *supra*, the Court stating:

> "We do not believe that the concept of bicameralism is rendered anachronistic and meaningless when the predominant basis of representation in the two state legislative bodies is required to be the same—population. A prime reason for bicameralism, modernly considered, is to insure mature and deliberate consideration of, and to prevent precipitate action on proposed legislative measures. Simply because the controlling criterion for apportioning representation is required to be the same in both houses does not mean that there will be no differences in the composition and complexion of the two bodies. Different constituencies can be represented in the two houses. One body could be composed of single-member districts while the other could have at least some multimember districts. The length of terms of the legislators in the separate bodies could differ. The numerical size of the two bodies could be made to differ, even significantly, and the geographical size of districts from which legislators are elected could also be made to differ. And apportionment in one house could be arranged so as to balance off minor inequities in the representation of certain areas in the other house. In summary, these

and other factors could be, and are presently in many States, utilized to engender differing complexions and collective attitudes in the two bodies of a state legislature, although both are apportioned substantially on a population basis." (377 U.S. at 576.)

Yet the District Court ignored completely the balance concept the General Assembly initiated. The balancing of single member districts in one body countering political jurisdictions adhering to population equality in the other was abolished by the District Court's order. For example, the lower court fragmentized Wythe County in the Fourth House District—deviating plus 6.0%—and placed a portion of the county with the Sixth House district—deviating minus 1.5% without ever looking at the Senate Districts containing the Fourth and Sixth House Districts, which Senate Districts, the Thirty-seventh and Thirty-eighth with deviations of minus 2.5% and plus 0.9%, respectively, balanced off the deviations in the House plan. This should not have been ignored.

Likewise the lower court, looking only at the House plan, fragmentized five thousand eight hundred sixty-three (5,863) citizens of Rockingham County in the Sixteenth House District—deviating plus 9.6%—and, ignoring a natural impassable boundary, namely, the Blue Ridge Mountains, placed such portion of the county on the other side of the mountain in the Twenty-sixth House District consisting of Albemarle, Greene, Fluvanna Counties and the City of Charlottesville—deviating minus 3.7%—while at the same time fragmenting a portion of Albemarle County consisting of two thousand ninety-two (2092) citizens into yet a third legislative district.

It is submitted that before the District Court, looking only at the House plan, fragmented the County of Rockingham,

it should have considered the Senate District comprising Rockingham (the Twenty-sixth) which deviated minus 4.37%.

Numerous other examples can be cited, one of which is the court's own redrawing of both the Senate and House seats for the Cities of Norfolk and Virginia Beach. Under the General Assembly's plan, the Senate seats (all single members) for the cities were: one seat for a portion of Virginia Beach, two seats for a portion of Norfolk, and a fourth seat for a portion of Virginia Beach (forty thousand, one hundred ninety-five [40,195] citizens) together with a portion of Norfolk (seventy-five thousand seven hundred sixty-four [75,764] citizens). House seats maintained political boundaries, with a floater being utilized in Virginia Beach. The Court consolidated the two Senate seats in Norfolk with the seat consisting of a portion of Virginia Beach and Norfolk, requiring forty-thousand, one hundred ninety-five (40,195) citizens of Virginia Beach to vote with the total population of Norfolk of three hundred seven thousand, nine hundred fifty-one (307,951). At the same time, the Court fragmented Virginia Beach in the House and instead of balancing the two bodies together by combining in the House a portion of Norfolk with Virginia Beach, it made portions of Virginia Beach vote with the total population of Norfolk in *both* houses of the General Assembly. The Commonwealth points out this aspect of the court's plan, not in the specific interest of either City, but as an example that with the political considerations inherent in such moves the General Assembly and not the court should have been the author of such a decision.

The populations and percentage deviations for both the House and Senate legislative districts are set forth for the Court's convenience in Appendix p. 56 et seq. attached hereto.

The point is that the two plans balancing one another fully justify any deviations existent in the House plan caused by adherence to political jurisdictional lines. An adherence, it is submitted, well justified for the reasons heretofore set out; the recognition previously given such policy by this Court; as well as the recognition given such policy by Lewis, District Judge, in his dissenting apologia for the interests of Fairfax County.

Finally, the decision of the court below enunciates an entirely novel principle of constitutional requirements in the arena of one man—one vote, without any decisional support. The holding of the District Court is that States may not rely upon the 1970 decennial census but must look behind such enumeration to determine where individuals "reside" in the technical legal sense of the word. Whether such a unique requirement is constitutionally mandated must be settled by this Court on the eve of the reapportionment being undertaken by the Commonwealth of Virginia's sister states.

Phrased in another manner, the change ordered by the District Court was based upon the unusual ground—that the manner of enumeration of the 1970 census limits states and localities in choosing between single and multimember legislative districts, necessitating adoption of the latter method of redistricting.

The Senate of Virginia, which consists of forty members, apportioned itself into forty single member districts, relying on enumeration figures of the United States Bureau of the Census. The District Court found that as to the City of Norfolk, which, together with a portion of the adjoining City of Virginia Beach, was divided into three single member districts, the enumeration of Naval personnel (which must be counted—*Davis* v. *Mann, supra,* at 691) was acceptable for Census enumeration purposes, but could only be used by the

Commonwealth in a multidistrict manner. Thus it was ordered that the three single member districts be combined with the three state senators to run at large, or else, one supposes, (except for the Court's mandate that elections must be held from the consolidated area) find where Naval personnel actually own or rent a home in the Commonwealth. This means also a determination of where: college students (counted at their school), institutionalized patients (counted at the institution); military men (counted at their base); actually "reside,"—making proper compensation for necessary adjustments. Such a requirement is fraught with difficulties and possible challenges.

The Census in determining manner and methods of enumeration ignores the traditional meanings of domicile and residence and counts an individual not in those terms but where he "lives," i.e., the place to which such individual has the greatest nexus. Consequently, an individual who, for example, is in State Government in Richmond and lives in an apartment or hotel during the week and commutes home every weekend to his family, home, and place where he votes, is enumerated in Richmond.

The Bureau of the Census decided that the nexus of Naval personnel would be to that place where they were homeported, and consequently enumerated those individuals at such port. The court requires redistricting of such individuals, not where the greatest nexus is but where they "reside" without any evidence whether they actually vote at such residence or can be found there a majority of the time. Yet it cannot be seriously contended that elected officials represent only registered voters. Everyone, be he voter or non-voter, adult or infant, incompetent or sane, felon or not, has the right to equal representation.

Plaintiffs did not advocate a different apportionment base be used by the Commonwealth of Virginia. Such bases

range from the traditional and broadest base of total population as used in the Commonwealth to the most restricted permissible base of registered voters. See *Burns* v. *Richardson, supra.* In between are the citizen population and qualified voter bases.

A census of total population is the broadest base and has been consistently used in this Commonwealth. As pointed out in the Report of the Commission on Constitutional Revision—Commentaries to Article II, Section 6, of the proposed apportionment section of the Revised Constitution—Virginia has not in recent times known any distinct departures from a population basis of representation evident in reapportionment litigation in many States. The Commonwealth has consistently reapportioned herself after each Federal census. In fact, as pointed out, Article II, Section 6, of the Revised Constitution of Virginia, which requires reapportionment in 1971, did not in the original proposal contain the provisions that reapportionment take place in the year 1971 and every ten years thereafter. The reason for this was clear. Section 43 of the old Constitution of Virginia provided that "a reapportionment shall be made in the year nineteen hundred and thirty-two and every ten years thereafter." Under this provision if the Constitution was revised without the requirement of reapportionment in 1971, reapportionment would not have been required until 1972. The requirement of reapportionment in 1971 was as indicated in order that the General Assembly of Virginia could reapportion itself at the first practical moment after completion of the 1970 decennial data was available and hence utilize such data.

What plaintiffs in fact did attack was not single-member districts; not the apportionment base; not the use of census data, but the decision of the General Assembly of Virginia

to accept the manner in which the United States Bureau of the Census enumerated Naval personnel.

2 U.S.C.A. § 2 (a) requires that each fifth Congress be given a statement "showing the whole number of persons in each State" as ascertained by decennial census of the population.

> "The phrase 'whole number of persons' has been defined historically by the Bureau [of the Census] to include citizens and aliens, persons of voting age and those below voting age, persons who are entitled to vote and those who are not yet entitled to vote, as well as those who have lost the right to vote." *Borough of Bethel Park, et al.* v. *Stans,* 319 F. Supp. 971, 973 (W. D. Pa. 1970).

There can be no doubt that the Commonwealth of Virginia views her legislators as charged with representing the views of all those persons so described who are counted in the district. They are not viewed as representing only those who would be eligible to vote for them. Since the Census enumerates the whole population, the General Assembly was proper in utilizing such data for its reapportionment base.

The latest challenge to the Census Bureau's manner of enumeration was contained in the case of *Borough of Bethel Park, et al.* v. *Stans, supra.* The case is so comprehensive and covers not only the issue raised by plaintiffs regarding enumeration of military personnel but also the compatible issues which arise regarding enumeration of students at colleges and inmates at institutions, all of which are enumerated as residents of the places where their respective military installations, colleges and institutions are located, it is felt therefore appropriate to quote the case at length:

> "Turning to the procedure established by the Director whereby members of the Armed Services serving within

the United States, college students and institutional inmates are enumerated as residents of the places where their respective military installations, colleges and institutions are located, the Court finds that this procedure has a rational basis and represents a proper exercise of discretion. The procedure for enumerating such persons is, in each instance, consistent with the governing principle of the Bureau that persons are to be enumerated at their usual place of residence at the time of the census, that place being the one in which they generally eat, sleep, and work, with persons who are temporarily absent for a few days or weeks from such usual place of being counted as residents of their usual place of abode. Thus, the aforementioned groups of persons are enumerated in the same manner as all other persons, including, for example, a professor who has accepted an appointment to teach at a college for one year but does not know where he will be employed the year thereafter or a businessman who has similarly accepted a one-year appointment at a given location.

"The Bureau has rejected as unsatisfactory criteria for enumeration concepts of 'domicile,' and 'legal residence.' This is not without justification. Each of these terms connoting a legal status are susceptible of varied definitions in different States and also depending upon the purpose for which the terms are used. To utilize any of these terms susceptible of multiple definitions as criteria for enumeration would be to abandon a uniform standard for the same. Moreover, to determine the legal status of a given individual as a domiciliary or legal resident of a particular State and political subdivision within a State, the census takers would be required to inquire of individuals as to their own judgments as to whether they had acquired such a legal status. Many persons would not be in a position to answer satisfactorily such an inquiry.

"The Bureau's governing principle is not without a rational basis. As a matter of the practical administration of the census, the Bureau has found that it can best

avoid missing substantial numbers of persons altogether, on the one hand, and the extensive duplication of persons, on the other, by enumerating persons as of their actual place of residence at the time of the census.

"Plaintiffs contend, however, that members of the Armed Services within the United States, college students, and inmates of institutions should be enumerated as of their home residences. Home residences, it is contended, could be ascertained from the records of the military installations, colleges and institutions. However, the testimony of Dr. Taeuber evidences that the Bureau has a rational basis for using a method of enumeration other than the one suggested by plaintiffs.

"In the case of members of the Armed Forces stationed in the United States, difficulties are presented in enumerating them as of home residences. There are those young men living in their parental home until induction into the Armed Forces and it could be presumed that they will return to their parental home when discharged. There are indications, however, that service in the Armed Forces may lead persons to settle in a different State on discharge. There are, similarly, young men who have left the parental home, who have married and started families. Presumably, they will return to their families, but frequently their service in the Armed Forces means a change of residence for their families, and it is by no means clear that they will return to their previous address. In addition, there are those young men who have left the parental home and who, prior to induction, are living in apartments or rooming houses. To assign them back to these living quarters, now occupied by someone else would raise the disturbing question as to who are the real residents of the living quarters. Finally, persons making a professional career of service in the Armed Forces may not have any real residence other than in the area in which they are serving.

"Plaintiffs contend that those servicemen who have left addresses which are occupied by others on the date

of the census at least could be counted back to the smallest political subdivision from whence they came. But, if one considers a serviceman who has left, for example, plaintiff-Borough of Bethel Park, the inaccuracy of such a designation is quite apparent. Bethel Park is a suburb within the metropolitan area of the City of Pittsburgh. If the serviceman's previous address in Bethel Park is occupied by another when he leaves the Armed Services, it is not unlikely, should he desire to return to his 'home area,' that he would seek residence, for example, in the City of Pittsburgh proper. If he did so, he would become a resident of a congressional district, State legislative districts, and political subdivision different from the ones in which he resided in Bethel Park.

"To enumerate college students as of home residences has been found no less of a problem by the Bureau. When the Bureau followed a procedure of enumerating college students as residents of their parental homes, there was evidence that a number of college students were reported neither by their families nor by the colleges. Also, college students are a transitional group in the population, and many will not return to the addresses of their parents. Again, as in the case of servicemen, some will not return to their home States. Of those who will return to a home State and even a 'home area' within that State there will be, nevertheless, many who acquire residences in congressional and State legislative districts and political subdivisions other than the ones in which they once resided.

"Enumerating inmates of institutions as of home residences presents similar and other difficulties. As in the case of servicemen and college students, many will not return to the same address from whence they came. In the case of penal inmates, many have of record no prior address. Inmates of homes for the aged will assume permanent residences there.

"In each of these cases, the persons in question draw upon the services of the communities in which their

military installations, colleges and institutions are located. The communities in which these persons are residing must plan and develop their public resources to provide for all residents. No abuse of discretion is found in enumerating these persons as inhabitants of these communities rather than as residents of a presumptive home to which many may not be expected to return. Moreover, there is no reason why different criteria should be applied to these persons than are applied to the population at large, many of which may have a status which may be characterized as equally transient on the date of the census.

"Plaintiffs also challenge the methods whereby the Bureau enumerates military servicemen and Government personnel abroad as residents of the States from whence they came and not as residents of any particular address or political subdivision within that State. Enumerating these persons as residents of particular addresses or political subdivisions presents the same problems as previously discussed with regard to military servicemen stationed within the United States and college students. Although military servicemen and Government personnel abroad may not even return to the State from whence they came, unlike military servicemen and Government personnel living within the United States, these persons cannot be enumerated as of any other State. There are presently a large number of members of the Armed Services abroad and the most feasible method of enumerating them as among the population of the United States is to count them back to the States wherein they were residents before entering the Armed Services.

"Plaintiffs further challenge the failure of the bureau to enumerate as residents of either a State or home residence private citizens who are living and working abroad. The short of the matter is that the Bureau has no means of locating these people.

"On review of the various methods of enumeration challenged here, the Court finds that plaintiffs have

failed to establish that these methods are without rational basis. The mere fact that an alternative method of enumeration may exist does not lead to the conclusion that the method employed is arbitrary or any less within the discretion of the Bureau. Nor does the fact that the Bureau has not conducted a statistical survey to determine how many servicemen, college students and institutional inmates in fact return to home States, political subdivisions or addresses compel the conclusion that the methods employed are without rational basis."

The decisions of the census regarding manner of enumeration have been sustained in numerous attacks, one of the earliest being *United States ex rel City of Atlanta, Georgia* v. *Steuart,* 47 F.2nd 979 (D.C. Cir. 1931), continuing with *Duesing* v. *Udall,* 350 F.2d 748 (D.C. Cir. 1965) cert. denied 383 U.S. 912 (1966); *Watson* v. *Gulf Stevedoring Corp.,* 400 F.2d 649 (5th Cir. 1968); *Udall* v. *Washington, Virginia and Maryland Coach Co., Inc.,* 398 F.2d 765 (D.C. Cir. 1968); *Warren Bank* v. *Camp,* 396 F.2d 52 (6th Cir. 1968); and one of the latest attacks being *Quon* v. *Stans,* 309 F.Supp. 604 (N.D. Cal. 1970).

Not only has the manner of enumeration of the Census been upheld, the census as a base measurement of total population and a proper base for reapportionment has never been declared improper. *Kirkpatrick* v. *Preisler,* 394 U.S. 526 (1969); *Burns* v. *Richardson, supra; Davis* v. *Mann,* 377 U.S. 678 (1964); *Reynolds* v. *Sims, supra; Wesberry* v. *Sanders,* 376 U.S. 1, 84 S.Ct. 526, 11 L. ed. 2d 481 (1964); and more recently, *Chavis* v. *Whitcomb,* 305 F.Supp. 1364, 307 F.Supp. 1362, where the three-judge court determined that even in the year 1969 the proper basis for reapportionment would be the 1960 decennial census.

Though *Burns* v. *Richardson, supra,* does not require States to use total population figures and approved a base

of reapportionment on a registered voter basis, it very clearly indicated it required such base to be substantially comparable proportionally to a base of total population.

Moreover, as pointed out in the later case of *Preisler* v. *Mayor of City of St. Louis*, 303 F.Supp. 1071 (N.D. Mo. 1969), a base of voter registration or comparable base is not *per se* a constitutionally permissible base for apportionment. It is constitutionally acceptable only if the results substantially reflect the result obtainable by the use of constitutionally permissible base, such as total population. It is submitted that *Preisler* in fact has affirmed that the total population is a constitutionally permissible base, *per se*. The reason for it being constitutional was further stated in *Preisler* wherein the Court went on to state:

> "It cannot be contended seriously that elected officials represent only registered voters. The right to equal representation does not depend upon the extent of a person's political activity or his exercise of political rights."

However, while these cases may be helpful, the *Burns* case especially, would not be applicable to this situation for, as already pointed out, in the Commonwealth of Virginia, Article II, Section 6, of the Revised Virginia Constitution clearly states that in reapportionment:

> "Every electoral district shall be composed of contiguous and compact territory and shall be so constituted as to give, as nearly as is practicable, representation in proportion to the *population* of the district."

Again, in Article VII, Section 5, of the Revised Constitution it is required that redistricting for local political subdivisions be done on the basis of *"population."* See also § 15.1-787 of the Code of Virginia (1950), as amended;

Chapter 201, 1971 Acts of Assembly; § 15.1-571, Code of Virginia (1950), as amended; Chapter 200, 1971 Acts of Assembly. Additionally, Chapter 199 of the 1971 Acts of Assembly, enacting § 15.1-37.5, specifically requires that in redistricting of counties, cities and towns wherein members of the governing body are elected from wards:

> ". . . the governing body of a county, city, or town shall use population figures of the most recent decennial United States census for such county, city, or town."

What better measure of population could there be than the Census? Simply stated, it cannot be contended, in view of the cited authority and general principles of reasonableness, that the Commonwealth of Virginia was arbitrary in relying upon the manner of enumeration used by the Census Bureau in the count of Naval personnel.

Plaintiffs and the District Court would have the Senate of Virginia redistrict "on a rule of thumb" that approximately fifty percent (50%) of the Naval personnel enumerated in Census Tract 000999 occupy housing elsewhere than the Fifth Senatorial District in which they were enumerated.

First, it must be emphasized that the census count is not a sample but a total count. It is clear from the evidence and undisputed by plaintiffs that Census Tract 000999, the Norfolk Naval Base, could not be divided. It was necessary to place all Naval personnel in that one census tract. Any other manner of enumeration by the Commonwealth of Virginia would have involved the numerous decisions made by the Bureau of Census regarding manner and methods of enumerations and would have led to a morass of litigation. The action of the Virginia General Assembly in adopting the census violated no constitutional rights. As indicated time and time again, the legislature of Virginia represents not

voters, it represents all resident individuals. Those individuals enumerated in the census tracts are fully represented and need the representation that any other individual needs regarding urban services, schools, police and fire protection, streets and highways, and even mass transportation.

That these military people had to be counted is undisputed. This was settled in *Davis* v. *Mann,* 84 S.Ct. 1441, 377 U.S. 678. It is submitted that the manner of counting them, i.e., reliance upon the census, in no way constitutes an invidious discrimination nor denies equal representation to any individual. To require that the City of Norfolk be the only locality in the Commonwealth of Virginia to have a multi-member senatorial district was not only an invasion by the judiciary into legislative policy determinations, but further resulted in a destruction of the balance struck between the Houses in Virginia's bicameral legislature.

The Senate, though single member districting the entire State necessitated some fragmentation, was careful to insure that any political subdivision that was fragmented would nonetheless have an effective voice in the legislative district. Though a portion of Virginia Beach was fragmented, it did have 40,195 of its population combined with 75,764 of Norfolk for a single senatorial district of 115,959,—a minus 0.2% deviation. It thus was assured effective responsiveness from its Senator. Now, however, with the Court abolishing the single member districts in Norfolk, the 40,195 individuals are combined with the entire City of Norfolk (307,951) and have no effective voice.

In short the General Assembly in relying upon the Census adopted the method of enumeration used by the Census. Representation of individuals would be on a total population base, with persons, whether citizens of Virginia or not, receiving such representation at the place, determined by the

Census, to be that at which they had the greatest nexus, the place where their daily lives would be most affected by legislative enactments. If the allocation of Naval personnel was proper for census purposes it was, it is submitted, also proper for redistricting purposes. If the concept of "live" used by the Census must be rejected then, prior to any redistricting, each State legislature must determine "residence" not only of Naval personnel, but all military personnel, college students, institutionalized inmates of hospitals, prisons, and mental institutions. The concept of one man-one vote makes no such requirement.

CONCLUSION

Nothing in the Federal Constitution nor past decisions of this Court prevents a State from choosing a legislative structure it deems best suited to the interests, temper and customs of its people provided population equality is maintained. The Virginia General Assembly chose carefully the thesis of its plan—single member districts for its upper chamber and recognition of political jurisdictions for its lower chamber. The plan adopted was one with the least population deviation the thesis would permit. The lower court unjustifiably discarded Virginia's plan both in the upper chamber, on a theory which rings with difficulty and illogic, and in the lower house on a doctrine of tyranny of numbers. Lastly, the District Court in the face of all authority judicially decreed what has always been deemed primarily a task for legislative consideration and determination, locking in for the decade of the seventies a plan devised by four individuals without hearings and substituted for the judgment of one hundred forty individuals all of whom represented constituencies which make the Commonwealth of Virginia what it is—people, not numbers.

It is submitted that in view of the unprecedented actions of the lower Court and the substantial federal questions presented by this appeal, plenary consideration by this Court, including briefs on the merits and oral argument, is required.

Respectfully submitted,

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CERTIFICATE

I, Anthony F. Troy, Assistant Attorney General of the Commonwealth of Virginia, a member of the bar of the Supreme Court of the United States, and one of counsel for appellants, hereby certify that a copy of the foregoing Jurisdictional Statement on Behalf of Appellants was on this the 11th day of September, 1971, mailed to James M. Thomson, Esquire, Plaintiff-Intervenor *pro se* P. O. Box 1138, Alexandria, Virginia 22313; Edmund D. Campbell, Esquire, Counsel for Plaintiffs Clive L. DuVal, II, et al., 1425 H. Street, N.W., Suite 822, Washington, D.C. 20005; Stanford E. Parris, Esquire, Counsel for Plaintiffs Stanford E. Parris, et al., 4085 Chain Bridge Road, Fairfax, Virginia 22030; The Honorable Andre Evans, Commonwealth's Attorney for Virginia Beach, Counsel for Defendant members of the Electoral Board of the City of Virginia Beach, Princess Anne Station, Virginia Beach, Virginia

23456; The Honorable Joseph H. Campbell, Commonwealth's Attorney of Norfolk, Counsel for Defendant members of the Electoral Board of the City of Norfolk, P. O. Box 1531, Norfolk, Virginia 23501; The Honorable R. F. Horan, Jr., Commonwealth's Attorney of Fairfax County, Counsel for Defendant members of the Electoral Board of Fairfax County, Fairfax, Virginia 22030; The Honorable Gordon B. Tayloe, Jr., Assistant City Attorney of the City of Norfolk, Counsel for Defendant-Intervenor City of Norfolk, 908 City Hall Building, Norfolk, Virginia 23501; The Honorable J. Dale Bimson, City Attorney of Virginia Beach, Counsel for Defendant-Intervenor City of Virginia Beach, Municipal Center, Virginia Beach, Virginia 23456; John Ashton, Esquire, Counsel for Defendant-Intervenor City of Virginia Beach, Hunton, Williams, Gay, Powell and Gibson, P. O. Box 1535, Richmond, Virginia 23212; The Honorable Henry E. Howell, Jr., Counsel for Plaintiffs Henry E. Howell, Jr., et al., 808 Maritime Tower, Norfolk, Virginia 23510; Henry L. Marsh, III, Esquire, Hill, Tucker and Marsh, Counsel for Plaintiff-Intervenors William S. Thornton, et al., 214 East Clay Street, Richmond, Virginia 23219; and C. V. Spratley, Jr., Counsel for Defendant-Intervenor Lewis A. McMurran, Jr., P. O. Box 575, Newport News, Virginia 23607; and to Robert L. Weinberg, Esquire, 1000 Hill Building, Washington, D. C. 20006, and C. Stanley Dees, Esquire, 314 North Pitt Street, Alexandria, Virginia 22314, plaintiffs who have filed separate notices of appeal. All parties required to be served have been served.

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